84-225

No.

In The Supreme Court of the United States

October Term, 1983

RICHARD MALIZIA,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

I. In a prosecution for murder, where the key factual issue was whether the defendant was present at the scene of the shooting, did the admission of hearsay testimony that the decedent had told the witness that he intended to meet with the defendant on the night he was shot, purportedly under the Hillmon exception to the hearsay rule, violate the defendant's rights under the Confrontation Clause where the hearsay was introduced to prove, not the intent or conduct of the declarant-decedent, but the conduct of the defendant?

II. Does the determination by the New York Court of Appeals that the defendant had not properly preserved the issue for its review having objected, prior to his first trial but not during the course of the second trial, constitute an independent and adequate state ground which defeats review by this Court?

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The opinion of the Court of Appeals of the State of New York is reported at ___ N.Y.2d ___, ___ N.Y.S.2d ___, (1984) and is reproduced at A-1. The opinion of the Supreme Court of New York, Appellate Division, First Department is reported at 92 App. Div. 2d 154, ___ N.Y.S.2d ___ (1983) and is reproduced in the Appendix at A-5.

JURISDICTION

The judgment of the Court of Appeals, State of New York was entered on May 10, 1984. The judgment and order of the Appellate Division was entered on March 8, 1983. Petitioner moved for an

extension of time within which to file his Petition for a Writ of Certiorari, and by order dated June 7, 1984, this Court extended the time within which to file the Petition to August 8, 1984. The Court has jurisdiction to review the judgment by Writ of Certiorari pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.... U.S. Const. Amend. VI. Cl. 5.

STATEMENT OF THE CASE

On December 19, 1978, the dead body of William ("Jimmy") Terrell was found near the New York Thruway. He had been shot by an unknown assailant. The decedent's brother, Harry Terrell, had also been shot and wounded.

Shortly after the shooting, Harry Terrell identified the gunman -- who had shot at him at midnight from a moving car with no lights -- as an Hispanic male. He later accused the Petitioner, Richard Malizia -- who is not Hispanic -- claiming that, while he had not actually seen Malizia, he knew he was at the scene of the shooting.

Appellant was indicted on four counts: (1) second degree murder of William ("Jimmy") Terrell by acting in concert with unidentified others; (2) second degree murder of William ("Jimmy") Terrell by acting in concert with unidentified others while engaged in a robbery; (3) attempted murder of Harry Terrell while acting in concert with unidentified others; and (4) assault on Harry Terrell while acting in concert with unidentified others.

Malizia was first tried in February 1980 before a jury in the Supreme Court, New York County. The primary factual issue was the identification of Malizia. A critical legal issue at that trial was

the admissibility of certain hearsay statements -- Harry Terrell's testimony that, on the evening preceding the shooting, his brother, the decedent, had told him that he was going to meet the Petitioner to purchase some drugs and to repay a debt. In a ruling made prior to trial in response to defendant's motion in limine, the court declared the hearsay testimony admissible under the authority of this Court's decision in Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1892). The trial ended with a hung jury.

The Petitioner's second trial began on October 2, 1980.

According to the prosecution's main witness, Harry Terrell, he and his brother Jimmy had driven a Toyota to 206th Street in Manhattan, near a Pathmark supermarket, bringing with them a bag of money. On their arrival, Jimmy got out of the car, entered a blue Ford positioned across the street, and spent several minutes there. He returned to the Toyota and told Harry to get a second bag of money. Harry returned with the money; Jimmy took it and reentered the Ford. Shortly after, the Ford, with its lights out, started toward the car in which Harry was seated. Harry heard a burst of gunfire and dropped to the floor of his car. He claimed to have caught a

glimpse of the Petitioner pointing a gun at him. Harry Terrell was injured in his arm, leg and finger. Jimmy was found dead of bullet wounds in his back early in the morning of December 19, on the side of the New York State Thruway.

At this trial, too, the hearsay evidence of the decedent's stated intention to meet the Petitioner on the night of the shooting was admitted into evidence. No fewer than three critical hearsay statements were admitted apparently under Hillmon and the state of mind exception to the rule against hearsay. First Harry Terrell testified that on the evening of December 18, his brother Jimmy asked him "to go with him

to meet Richy at 12:00 ... at the Pathmark." Later, according to Harry, Jimmy told him that he was going to see if Richy had any drugs and that he owed Richy some money which he wanted to repay. Still later that night, at about twenty minutes before midnight, Harry testified that Jimmy said "I am going to go now to meet Richy."

The primary trial issue was again the identification of Malizia, proof of which rested on Harry Terrell's testimony. The defense attempted to impeach Terrell's identification by challenging his credibility and by exposing the adverse circumstances under which Terrell had allegedly seen Malizia. Thus the defense

brought out that Terrell had originally identified the assailant as Hispanic, and that only later did he accuse Malizia, not because he had not seen him, but because he "knew he was there." At trial, after suggestive hypnosis during which he was told to hold in his mind an image of Malizia pointing a gun at him, Terrell claimed that "in a flash" prior to the shooting he had glimpsed Malizia pointing a gun at him from the moving car. Under these circumstances the hearsay statements about the decedent's intention to meet with Malizia on the night of the 18th were essential to the

case, serving to bolster substantially Terrell's weak and suspect identification.

This time, on October 9, 1980, the Petitioner was convicted on all four counts. He was sentenced to concurrent terms of 25 years to life on Counts I and II; 8-1/3 to 25 years imprisonment on Count III to run consecutively with the sentence on Counts I and II; and five to 15 years imprisonment on Count IV to run concurrently with the sentence on Count III, but consecutively with the sentence on Counts I and II.

By order dated March 8, 1983, the Appellate Division, First Department, affirmed.

On appeal, several issues were raised regarding the sufficiency of the evidence and the propriety of several evidentiary rulings. The Appellate Division ruled that there was sufficient evidence to support the conviction, but that the trial court had erred in permitting questions with regard to Harry Terrell's assumption of family obligations for his deceased brother's children and in precluding cross-examination of Harry Terrell intended to elicit that the witness had received a promise of favorable consideration from the federal prosecutor's office in connection with

his cooperation in a separate case. The Appellate Division, however, ruled that the errors were harmless.

The Appellate Division focused primarily on the Confrontation Clause-Hillmon hearsay issue:

> Recognizing that the application of this principle in criminal cases to permit an inference with regard to an event that involves the conduct or cooperation of a person other than the declarant has been the subject of scholarly and judicial disagreement, that the issue has not previously been authoritatively addressed in this State, and that some scholarly opinion is opposed to such an application to such state of mind exceptions, we are nonetheless persuaded that the testimony in question was here properly admitted under the circumstances presented.

A-6-A-7. Again, the Appellate Division denied that, even if the admission of the testimony was error, it was harmless error.

The Court of Appeals for the State of New York affirmed. The Court did not reach the evidentiary and constitutional issues concerning the admission of the hearsay testimony about the victim's declaration of future intended conduct the night of the homicide. The Court noted that, deeming himself bound by the pretrial evidentiary ruling made at Petitioner's first trial and on the understanding that the prosecutor also viewed that pretrial ruling as binding, counsel for Malizia had made no objection

which appears on the record to the hearsay testimony at the second trial. The Court of Appeals, stating that "[e]videntiary rulings made at one trial ... are normally not binding in a subsequent trial," concluded that the point was not preserved for its review.[1]

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[1] This issue is discussed at length in Point II, infra. In addition, if the New York Court of Appeals is without jurisdiction to decide this issue, then this Court should grant the Writ of Certiorari to review the final judgment of the New York Appellate Division.

I. THE ADMISSION OF HEARSAY STATEMENTS OF INTENT TO PROVE, NOT THE CONDUCT OF THE DECLARANT, BUT THE CONDUCT OF A THIRD-PARTY -- THE DEFENDANT --, VIOLATED THE PETITIONER'S RIGHTS UNDER THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE.

On the authority of this Court's well-known decision in Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1892), Harry Terrell testified to a series of hearsay statements of the decedent Jimmy Terrell. The statements were expressions of Jimmy Terrell's intention to meet the Petitioner, Richard Malizia, at a certain location on a certain night. The statements were not admitted as evidence from which the jury could infer that Jimmy Terrell had acted in accordance

with his stated intention -- that is, that he had gone to 206th Street in the Bronx on the night he was shot. There is and was no dispute that he went to that location and that he did so with his brother Harry Terrell.

Rather, the hearsay declarations were introduced to show that a third party, the Petitioner Richard Malizia, had gone to 206th Street on the night in question. Petitioner maintains that this extension of the "state of mind" exception to the rule against hearsay is in conflict with decisions of other state and federal courts, is without basis in either law or

logic, and resulted in the denial of his rights under the Constitution's Confrontation Clause.

The Confrontation Clause, which is applicable to the States through the operation of the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400, 403-05 (1965); Davis v. Alaska, 415 U.S. 308, 315 (1974), provides:

> In all criminal prosecutions the accused shall enjoy the right ... to be confronted with the witnesses against him.

The Clause reflects policies similar to those which underly the evidentiary rules against hearsay. See, e.g., California v. Green, 399 U.S. 149 (1970). While not every hearsay problem is a Constitutional

problem, see, e.g., id., "The historical evidence leaves little doubt ... that the Clause was intended to exclude some hearsay." Ohio v. Roberts, 448 U.S. 56, 63 (1980). This Court has not sought to "map out a theory of the Confrontation Clause that would determine the validity of all ... hearsay exceptions." California v. Green, supra, at 162. In Ohio v. Roberts, 448 U.S. 56, 66 (1980), however, the Court did set out the general rule:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he in unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a

> firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

(footnote excluded, emphasis added).

Here, the declarant's unavailability is not at issue, but the reliability of his declaration surely is. The admission of a statement under the state of mind exception to the hearsay rule to prove subsequent acts of someone other than the declarant is an unjustifiable expansion of the Hillmon rule, not a firmly rooted hearsay exception. Moreover, the statements at issue bear no indicia of reliability or trustworthiness as to the fact sought to be proved -- Petitioner's whereabouts on the night in question.

In Hillmon, a civil case, this Court upheld the admissibility of a hearsay statement that the decedent intended to go to a particular location at a future time. Although the Court held only that the hearsay statement was admissible on the question of the declarant's intent under the "state of mind" exception to the rule against hearsay, its reasoning would also suggest that the hearsay would also be admissible to prove the declarant's conduct, that is, that he acted in conformity with his statement of intent. Hillmon, so read, has always been deemed extraordinary and controversial. See, e.g., United States

v. Pheaster, 544 F.2d 353, 376 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977).

But it is a further extension of the Hillmon doctrine which is at issue here: whether a hearsay statement that A intended to do something with B is not only some evidence that A followed through on his intention but that B also acted in accord with A's intention. While some courts have accepted such an extension of the Hillmon rule, these decisions have come under trenchant criticism. The issue is an important and recurring one and it merits this Court's attention.

Fifty years ago, in Shepard v. United States, 290 U.S. 96 (1933), Justice Cardozo suggested that Hillmon must be limited to proof of the declarant's state of mind and stated unambiguously that Hillmon does not render admissible hearsay statements as proof of third parties' intentions or conduct. In Shepard, the defendant was accused of poisoning his wife. The prosecution introduced a statement of the wife that she had been poisoned by her husband. Holding that this testimony should have been excluded, Justice Cardozo wrote:

> There are times when a state of mind, if relevant, may be proved by contemporaneous declarations of feeling or intent. Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, (further citations omitted). Thus,

in proceedings for the probate of a will, where the issue is undue influence, the declarations of a testator are competent to prove his feelings for his relatives, but are incompetent as evidence of his conduct of theirs.

* * *

Declaration of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.[*]

The testimony now questioned faces backward and not forward. This at least it did in its most obvious

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* In fact, it could be argued that hearsay statements as to the past are more reliable than statements looking toward the future. After all, the declarant may know and may report accurately what he felt or did in the past. No mortal can know with any certainty what will come to pass in the future.

> implications. What is even more important, it spoke to a past act, and more imporant than that, to an act by someone not the speaker. (emphasis added)

Shepard v. United States, 290 U.S. at 104, 105-06 (emphasis added).

While the case law is not consistent, most courts which have confronted the issue in recent years have concluded that the Hillmon doctrine does not and cannot render an extrajudicial statement by the declarant about his state of mind admissible to prove the state of mind or conduct of a third party. In United States v. Brown, 490 F.2d 758 (D.C. Cir. 1974), the United States Court of Appeals for the District of Columbia Circuit discussed the issue at length. In that

case, also a prosecution for murder, the trial court permitted the victim's wife to testify that her husband had told her prior to his death that he was frightened that he would be murdered by the defendant. The jury was instructed that the testimony should be considered only in connection with evaluating the victim's state of mind and its effect on his conduct and could not be considered to evaluate the state of mind or conduct of the defendant. The Court of Appeals nevertheless reversed the conviction, holding that the admission of the testimony was prejudicial and that the limiting instruction was incapable of undoing the harm. The court stated that

hearsay statements by the victim of a homicide which inferentially implicate the defendant even where the victim's state of mind is actually in issue are

> fraught with inherent dangers and require the imposition of rigid limitations. The principle danger is that the jury will consider the victim's statement ... as somehow reflecting on defendant's state of mind rather than the victim's -- i.e., as a true indication of defendant's intentions, actions or culpability. Such inferences are highly improper and where there is a strong likelihood that they will be drawn by the jury the danger of injurious prejudice is particularly evident.

Id. at 765-66 (footnotes omitted). See also United States v. Cohen, 631 F.2d 1223, 1225 (5th Cir. 1980); Gual Morales v. Hernandez Vega, 579 F.2d 677, 680 n.2 (1st Cir. 1978); United States v. Kaplan,

510 F.2d 606, 610 (2d Cir. 1974); Clark v. United States, 412 A.2d 21, 25 (D.C. Ct. App. 1980); State v. Vestal, 273 N.C. 561, 180 S.E.2d 755 (1971). Contra: United States v. Phaester, 544 F.2d 353, 376-80 (9th Cir. 1976); State v. Cugliata, 372 A.2d 1019 (Me. 1977); People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627 (1944).

Here, of course, the hearsay testimony was introduced solely to prove Petitioner's conduct. The declarant's state of mind and conduct were simply not at issue; no one disputes that Jimmy Terrell was present at 206th Street on the night in question. And, of course, no limiting instruction was given

confining the use of the testimony to determining Jimmy Terrell's state of mind or actions. The hearsay was introduced to the jury, and was obviously used by it, as evidence of the Petitioner's whereabouts during the night of December 18-19. Such an extension of the Hillmon doctrine is unjustified and runs afoul of the requirements of the Confrontation Clause.

The statements do not bear the requisite indicia of reliability or trustworthiness to justify the creation of a new hearsay exception or to satisfy the Confrontation Clause's requirements. The Appellate Division itself, adverted to the unreliability of an inference

which implies conduct on the part of one other than the declarant. The court did not find this argument compelling because "the inference in question is one of degree rather than kind, and merely goes to the weight of the evidence." But whatever force there may be in the inference that A has in fact acted in accordance with his expressed intent does not extend to an inference that another will act in conformity with A's intent. How easy life would be if what we desired from others was so generally achieved. But, alas, life is simply not so predictable.[2]

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[2] Assume that A tells a friend that he intends to drive to Connecticut to lunch

The unreliability of the inference is so great that it cannot merely go to the "weight" of the evidence. Surely, no lay jury would appreciate the weakness of the evidence, at least without clear

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with a potential client. We know that any number of contingencies can interfere with the plan -- A's car will not start, or he suffers an attack of appendicitis, for instance, or the client calls and cancels the appointment. To whatever extent it may be logically inferred that A in fact went to Connecticut and met with the client, it surely cannot be said that A's statement is meaningful proof that his car did start, that he did not develop appendicitis, that his client did not cancel or that the client ever intended to meet A. Similarly the decedent's statement that he intended to meet with Petitioner is not proof that Petitioner kept the appointment. So many inferences are required to reach a contrary conclusion that, given the dangers which led to the creation of the rule against hearsay, and the Constitution's guarantee of a right to

instructions as to the problem. See United States v. Kaplan, 510 F.2d 606, 610 (2d Cir. 1974).

The Appellate Division also recognized "the apparent inconsistency with the state of mind exception of an inference relating to the conduct of another person, the inference conceptually implying, in addition to the declarant's

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confront witnesses, the statement cannot be deemed competent proof of Petitioner's acts.

Indeed, there is no way to know the basis of Jimmy Terrell's statement that Petitioner would meet him at the Pathmark. While it may have been based on a conversation Jimmy had had with the Petitioner, it is just as likely that some unknown other party had told Jimmy that Petitioner would meet him there. That makes the statement double hearsay and wholly unreliable as proof of Petitioner's conduct.

state of mind, a conclusion with regard to the state of mind of the third person." The problem is not merely "theoretically awkward"; it is real. Exceptions to the hearsay rule are generally premised on the necessity for the hearsay evidence and the intrinsic reliability of the hearsay. Thus, the state of mind exception itself exists because there is often no more reliable way to derive a person's state of mind than to look to that person's own statement. As a branch of the "current sense impression doctrine," reliability is suggested because the spontaneity and contemporaneity of the expression minimizes the chances of

untrustworthiness. See McCormick, Evidence, §294 at 695 (2d ed. 1972). But any reasons justifying the recognition of the "state of mind" exception simply lose their force and do not apply to an extension to third party's acts. A's senses, impressions, feelings or intentions are simply not the only available or the best evidence of B's senses, impressions, feelings or intentions. Moreover, the factors suggesting reliability and trustworthiness just do not exist in the context of a third party. The "theoretical awkwardness" is more than

that; it is the virtual absence of a logical rationale for the "new" exception to the hearsay rule.

Justice Traynor put it well in his now-classic dissent in People v. Alcalde, 24 Cal. 2d 177, 148 P.2d 627 (1944):

> A declaration as to what one person intended to do, however, cannot safely be accepted as evidence of what another probably did .... The declaration of the deceased in this case that she was going out with [the defendant] is also a declaration that he was going out with here .... The only purpose that could be served by admitting such declarations would be to induce the belief that the defendant went out with the deceased, took her to the scene of the crime and there murdered her .... Her declarations cannot be admitted for that purpose without setting aside the rule against hearsay. 24 Cal. 2d at 189-190, 1481 P.2d at 633. Accord, U.S. v. Cohen, 631 F.2d 1223, 1225 (5th Cir. 1980); U.S. v. Pheaster,

544 F.2d at 384 (Ely, J., concurring and dissenting); U.S. v. Kaplan, 510 F.2d 606 (2d Cir. 1974).[3]

In this case, the decedent's statements that he intended to go to the scene of the crime reflect his state of mind. They would have been admissible under Hillmon to prove that he intended to go and, inferentially, that he did go there. But that fact was never at issue. It was

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[3] Despite the holding in Kaplan, subsequent Second Circuit cases treat the question as an open one. See, e.g., U.S. v. Mangan, 575 F.2d 32, 43 n.12 (2d Cir.), cert. denied, 439 U.S. 931 (1978).

uncontested that Jimmy Terrell was at the scene of the crime when the incident occurred.[4]

The court below acknowledged this but suggested a number of reasons why the hearsay was, in this case, trustworthy. But virtually all of the factors it

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[4] People v. Lauro, 91 Misc. 2d 706, 398 N.Y.S.2d 503 (Sup. Ct. Westchester County, 1977), the only New York case dealing with the subject, noted that, as interpreted in Alcalde and Pheaster, Hillmon is an extraordinary doctrine. The Lauro court did not pass on the scope of Hillmon because it found that the testimony there proferred required the drawing of too many inferences. The Lauro court did suggest that different rules may be appropriate for civil and criminal cases. Id. at 709. The Confrontation Clause, after all, applies only in criminal cases and thus suggests a neat distinction explaining the different results in Hillmon and Shepard.

listed would confirm only the trustworthiness of the decedent's statement of his intent to meet with the Petitioner, a fact not in issue.[5]

The scope of the Hillmon exception to the rule against hearsay and the exception's compatability with the

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[5] The one exception is, in the Appellate Division's words, as follows: "Experience suggests that someone who wishes to pay a large sum of money to another with whom he has been meeting on a regular basis over a period of time is not likely to encounter insuperable difficulties in the way of paying the debt." The defect in this analysis is that the "fact" that the decedent intended to pay a debt is also established only by the inadmissible hearsay.

Confrontation Clause are important and difficult questions which deserve this Court's attention.

II. THE DETERMINATION BY THE NEW YORK COURT OF APPEALS THAT PETITIONER HAD NOT PROPERLY PRESERVED THE ISSUE FOR REVIEW DOES NOT DEFEAT REVIEW BY THIS COURT ON CERTIORARI.

Deeming himself bound by the pretrial ruling made before Petitioner's first trial, and on the understanding that the prosecutor also viewed that pretrial ruling as binding, Petitioner's counsel made no objection that appears on the record to admission of the critical Hillmon-hearsay in the course of Petitioner's second trial. The admission of that testimony and the resultant violation of Petitioner's rights under the Confrontation Clause was, however, the primary claim of error on appeal, and

the issue the Appellate Division chose to address at length. On that appeal, the State made no claim that the evidentiary issue had been waived because no objection was made to the testimony when it was introduced.

In Petitioner's application for leave to appeal to the Court of Appeals of the State of New York, the hearsay issue was again the issue on which Petitioner focused in his attempt to convince that Court to review his case. Again, in its papers in opposition, the State raised no claim that the issue had been waived by a failure to object again at the second

trial to the introduction of the testimony. The Court of Appeals granted leave to appeal.

In its brief to the Court of Appeals, the Hillmon-Confrontation Clause issue was briefed at length. Then, for the first time, the State took the position that the issue was not preserved for the court's review. The Court of Appeals agreed, stating without citation of authority, "[e]videntiary rulings made at one trial ... are normally not binding in a subsequent trial," A-4.

It is well-settled that this Court will not review a judgment of a State court which rests on an adequate and independent state ground. Michigan v.

Long, 103 S.Ct. 3469 (1983). The adequate state ground rule is a function of the limitation of appellate review. Fay v. Noia, 372 U.S. 391, 429 (1963).

It is also well settled that the failure to comply with a state procedural rule may constitute an adequate state ground barring this Court's review of a federal question. Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978). But a minor procedural default does not constitute an adequate independent state ground. Parrot v. City of Tallahassee, 381 U.S. 129 (1965); Wright v. Georgia, 373 U.S. 284 (1963).

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal

> rights, when plainly and reasonably made, is not to be defeated under the name of local practice.

Davis v. Wechsler, 263 U.S. 22, 24 (1923) (Mr. Justice Holmes), quoted in Fay v. Noia, 372 U.S. 391, 432 (1963).

It is incumbent upon this Court to ascertain for itself whether an asserted non-federal ground independently and adequately supports the judgment. Michigan v. Tyler, supra, at 3474, quoting Abie State Bank v. Bryan, 282 U.S. 765 (1931). The question of when and how defaults in compliance with state procedural rules can preclude this Court's consideration of a federal question is itself a federal question. Fay v. Noia, supra, at 447. Failure to

present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review by this Court only if the state has a legitimate interest in enforcing its procedural rule, Michigan v. Tyler, 436 U.S 499, 512 n.7 (1978), and only if the state's insistence on compliance with its rule is necessary to vindicate the state's interest in the particular case at bar. Henry v. Mississippi, 379 U.S. 443, 447-49 (1965).

> Our decisions ... stress that a state procedural ground is not "adequate" unless the procedural rule is "strictly or regularly followed." Barr v. City of Columbia, 378 U.S. 146, 149 (1964). State courts may not avoid deciding federal issues by invoking

> procedural rules that they do not apply evenhandedly to all similar claims.

Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982).

In the instant case, while it cannot be denied that the rule requiring objection to evidence sought to be introduced at trial serves the legitimate State purpose of affording the Court an opportunity to consider the nature of the objection and to make an informed legal ruling, it is also clear that the purpose of that rule was served here. Before Petitioner's first trial, lengthy argument was had on the Hillmon hearsay issue and a ruling was made. Petitioner's counsel believed that the Petitioner was bound by that

pre-trial ruling and believed that the prosecutor -- the same prosecutor who had tried the first trial -- believed it to be binding as well.[6] Moreover, even if an express objection had been made during the course of the second trial and had the second trial judge determined that he was not bound by the previous ruling under the "law of the case" doctrine, it is clear from his other evidentiary rulings that he would have come to the same conclusion with regard to admissibility. Under these circumstances

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[6] Surely there was no knowing and intelligent waiver, no knowing bypass of an opportunity to litigate the issue.

the purpose of the rule requiring an objection at trial was substantially served.

In addition, the Court of Appeals has itself held that there are exceptions to the general rule that a timely objection is necessary to create a question of law reviewable by the Court of Appeals. See People v. Michael, 48 N.Y.2d 1, 420 N.Y.S.2d 371, 394 N.E.2d 1134 (1979).

It is not at all clear that the procedural rule invoked by the New York Court of Appeals is anything but a transparent excuse for a refusal to confront a difficult and substantial federal question. Indeed, that Court itself only goes so far as to say that

evidentiary rulings made it one trial are normally not binding at a subsequent trial, suggesting by its own ambiguous words that counsel's understanding on the binding nature of the first ruling was not entirely without basis in New York law.

Under these circumstances, counsel's failure to object at the second trial should not be deemed an adequate and independent state ground depriving this Court of jurisdiction to review the important Constitutional issue involved.[7]

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[7] To the extent that the New York Court of Appeals was without jurisdiction to decide the issues raised, then the Appellate Division was the highest court of the state in which a decision could be had and Petitioner prays that the Writ of

CONCLUSION

For the reasons stated, Petitioner respectfully prays that this Court grant a writ of certiorari.

Respectfully submitted,

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August 6, 1984

Certiorari be granted to review the judgment of the Appellate Division.

MEMORANDUM

STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE etc.,

Respondent,

-against-

RICHARD MALIZIA,

Appellant.

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

Alan M. Dershowitz, N.Y. City, & Frank A. Lopez, Brooklyn, for appellant.

Robert M. Morgenthau, DA, NY County (Bruce Allen & Robert M. Pitler of counsel) for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed (see 92 AD2d 154).

On this appeal, defendant contends the evidence of guilt is insufficient, particularly because of the lack of credibility of Harry Terrell, the People's principal witness,

and that the trial court committed reversible error in several evidentiary rulings.

After an earlier trial had resulted in a hung jury, defendant was convicted in a second trial of felony murder (robbery) and common law murder resulting in the death of William Terrell and of the attempted murder and assault first degree of Harry Terrell, the decedent's brother. The facts are set forth in detail in the opinion of the Appellate Division and need not be repeated here. Briefly, however, the crime occurred in New York City on the evening of December 18, 1978 after the decedent and his brother drove to a street which was deserted at that late hour, where decedent met with defendant and others waiting there in a parked car. Harry Terrell waited down the street in the Terrell vehicle. The purpose of the meeting was to buy drugs and to deliver money to defendant to pay him for past drug purchases. The jury found that defendant shot decedent and then attempted to kill Harry Terrell, sitting in the parked Terrell car, as defendant and his associate sped away from the scene. Decedent's body was found later several miles from the scene of the meeting.

We agree with the Appellate Division that the verdicts are supported by the evidence. In reviewing the evidence we are obliged to do so in the light most favorable to the People (*People v. Kennedy,* 47 NY2d 196) bearing in mind that credibility is matter to be determined by the trier of the facts (*People v. Parks,* 41 NY2d 36, 47). Since the record contains evidence sufficient in quantity and quality to support the verdicts, our review function is exhausted (see *People v. Gruttola,* 43 NY2d 116, 122; *People v. Joyiens,* 39 NY2d 197, 203).

Nor do we find grounds for reversal on the court's evidentiary rulings. Defendant claims that the court erred

in permitting evidence that Harry Terrell had cared for the victim's son after the homicide and in limiting defense counsel's cross examination of Terrell about favorable treatment he expected from the authorities on pending criminal charges in exchange for his testimony in this action. Even if defendant's contention be accepted, reversal is not required for there was no reasonable possibility that these rulings contributed to defendant's conviction and thus they were harmless beyond a reasonable doubt (see *People v. Crimmins,* 36 NY2d 230, 237). Harry Terrell's character, particularly his extensive criminal activities, was fully developed for the jury. It also was told that he had been granted immunity for past crimes by the prosecutor and that the prosecutor had offered to contact other law enforcement authorities on his behalf after he testified against defendant. If defendant wished to pursue the subject further, counsel should have requested a voir dire to explain the area he wished to examine and the necessity for it.

Nor has defendant preserved for review by appropriate objections his further contentions that the court committed error in permitting Terrell to testify after an attempt to hypnotize him (see *People v. Hughes,* 59 NY2d 523) and in permitting him to give hearsay testimony concerning the victim's declarations of future intended conduct the night of the homicide (see *Mutual Life Insurance Co. v. Hillmon,* 145 US 285). Defendant maintains that he has preserved his objection to the testimony concerning decedent's future intention because at the beginning of the first trial the judge ruled over his opposition that it would permit Harry Terrell to testify about statements made by decedent to him on the night of the crime that he intended to meet defendant that evening. He contends that this ruling constituted the law of the case and that it was binding on the parties and the court in the second trial before a new judge.

Evidentiary rulings made at one trial, however, are normally not binding in a subsequent trial. In this case there is nothing in the record to indicate that the earlier ruling was brought to the attention of the second judge or that he or counsel considered themselves bound by it. Nor did counsel object when Terrell testified concerning statements of the victim made the night of the crime. He did object to a statement of decedent's intent made two weeks before the homicide, upon grounds of relevancy not competence, but at the time of that objection defense counsel stated that he had not objected to the earlier evidence of the victim's statements made on the night of the crime because counsel considered them part of the res gestae. Accordingly, the point is not preserved for our review.

* * * * * * * * *

Order affirmed in a memorandum. Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer, Simons and Kaye concur.

Decided May 10, 1984

DECISION

SUPREME COURT APPELLATE DIVISION
FIRST DEPARTMENT

November 1982

HON. LEONARD H. SANDLER, J.P.
HON. JOHN CARRO
HON. J. ROBERT LYNCH
HON. E. LEO MILONAS, J.J.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

RICHARD MALIZIA,

Defendant-Appellant.

Appeal by the defendant-appellant from a judgment of the Supreme Court, New York County (Fitzer, J.), rendered on February 11, 1981, which convicted defendant, after a jury trial, of murder in the second degree, attempted murder in the second degree and assault in the first degree.

Alan M. Dershowitz, of counsel (Nathan Z. Dershowitz with him on the brief; Frank A. Lopez, attorney) for the defendant-appellant.

Bruce Allen, of counsel (Norman Barclay with him on the brief; Robert M. Morgenthau, attorney) for the respondent.

SANDLER, J.

The defendant was convicted after a jury trial of two counts of murder in the second degree (common law and felony murder), attempted murder in the second degree and assault in the first degree, and was sentenced to two concurrent terms of 25 years to life, and also to two concurrent terms of 8⅓ to 25 years and 5 to 15 years, to be served consecutively to the life sentence.

Of the several issues presented on this appeal, the one that seems to us to merit extended analysis is raised by the contention that reversible error occurred when the trial court admitted into evidence a statement of the deceased on the evening of the homicide that he was going to see the defendant. This testimony was admitted by the trial court under the state of mind exception to the hearsay rule pursuant to principles that derive from the well-known decision of the United States Supreme Court in *Mutual Life Insurance Co. v. Hillmon,* 145 U.S. 285. The governing principle allows, under appropriate circumstances, declarations of intention offered to show subsequent acts of declarant where the acts are relevant to a trial issue. The declarant's statement is permitted to show his existing intent, and from this intent the trier of fact is permitted to infer that the act was carried out.

Recognizing that the application of this principle in criminal cases to permit an inference with regard to an event that involves the conduct or cooperation of a person other than the declarant has been the subject of scholarly and judicial disagreement, that the issue has not previous-

ly been authoritatively addressed in this State, and that some scholarly opinion is opposed to such an application of the state of mind exception, we are nonetheless persuaded that the testimony in question was here properly admitted under the circumstances presented. We are also persuaded that if the admission of this testimony were error, the error would have been harmless since, wholly apart from the challenged statement, the totality of the evidence inescapably leads to the conclusion that the deceased had in fact intended to meet the defendant, and indeed did so.

The deceased, William Terrell, was a major drug dealer. His brother, Harry Terrell, the principal People's witness, was also a major drug dealer who worked from time to time in the deceased's drug selling operation. Sometime on the evening of December 18, 1978, at the apartment of the deceased's girlfriend, Brenda Beasley, also a witness for the People, the deceased asked his brother to go with him to meet Richy at 12:00 o'clock at the Pathmark. The deceased said that he had received some money from people who wanted to make a drug purchase, that he was going to see if Richy had any drugs, and that he also owed Richy some money and wanted to pay him. Harry Terrell understood the name Richy to be a reference to defendant, whom he knew as Richy Pontiac, and whom he had met on a number of occasions in the preceding two months, usually in the company of the deceased, and on several occasions near the Pathmark store located on 206th Street between Ninth and Tenth Avenue.

Shortly before midnight the two men left for the Pathmark in a car driven by Harry. In the car was a shoulder bag which contained bundles of money. The deceased told Harry that the bag contained the money that

he owed the defendant. Harry drove to the intersection of Tenth Avenue and 206th Street, a two-way street, parking on the south side of 206th Street facing Ninth Avenue. The deceased left the vehicle with the bag and walked down the block to a blue Ford parked on the north side of the street near the corner of Ninth Avenue. Harry recognized the car as one that he had seen the defendant use on all but one of the prior occasions on which he had seen the defendant. The license plates disclosed it to be a rental car. The deceased entered the front of the blue Ford, emerging a few moments later without the bag, and told his brother to return to the Beasley apartment to secure more money.

Harry returned to the Beasley apartment and received from her another bag in which he again observed bundles of money. At 206th Street Harry parked his car in the same spot. The deceased appeared moments later, took the new bag, returned to the blue Ford and entered it.

Suddenly the Ford took off at a rapid pace, headlights off, in the direction of the car in which Harry was waiting. He heard a burst of noise, which sounded like firecrackers. As the car reached Harry's car he saw the defendant in the middle of the back seat pointing a gun directly at him. Harry dropped immediately to the floor as a burst of gunfire knocked out the windows of his car. In addition to the defendant, Harry also saw the driver, who, like the defendant, was a white man.

In the early morning of December 19, 1978, a State Trooper found the dead body of the deceased on the side of a northbound lane of the New York State Thruway, a series of bullet holes running from his back to his head. No bullets or bullet fragments were observed in the surrounding area.

The medical examiner testified that the deceased had died of multiple bullet wounds. Nine bullets had entered his body almost simultaneously, all from the back, and eight of them had travelled on a left-to-right track. An expert witness testified that the upward swing of the line of fire indicated that a single semi-automatic weapon had inflicted the wounds in a matter of seconds. An examination of the deceased's hat and coat disclosed 17 bullet holes, seven with gunshot residue around them, indicating that the gun had been fired eight to twelve inches from the holes.

From evidence found at the location of the car occupied by Harry Terrell on 206th Street, it was determined that thirteen bullets had been fired at the driver's side of the car that nine had pierced the frame, that the path of the bullets suggested that they had been fired from a moving car, and that at least two automatic or semi-automatic weapons had been used in that attack.

At about 5:00 P.M. on December 19 the defendant and his brother, John Malizia, went to a Ford dealership in Spring Valley, New York, where they told the rental manager that a car rented by John over a period of several months, a 1979 blue Ford Granada, had been stolen the previous day. The two brothers explained that they had not reported the larceny of the car because each had thought that the other had the car. The police were unable to find the car.

Brenda Beasley testified that she had spoken on the telephone on several occasions to someone who had identified himself as Richy in the weeks prior to the homicide. She had twice accompanied the deceased to the area of the Pathmark. On each occasion the deceased had left her and had entered a rental blue Ford car. On one occasion, leav-

ing the scene of the meeting, she had observed the defendant in the car.

In addition, there was testimony that the portion of the New Yor State Thruway where the body of the deceased was found was along the route that would be taken by a car proceeding from 206th Street to Monsey, New York, where the defendant's brother resided.

By any standard the evidence here summarized impressively and convincingly supported in every respect the jury's verdict. We find wholly without merit the defendant's contention that the proof was insufficient because no one had observed the defendant actually shooting the deceased. The defendant was seen within seconds after a burst of gunfire had killed the deceased, gun in hand, about to undertake the murder of Harry Terrell. He was identified by someone who had met him on a number of occasions and had no discernible reason to lie with regard to the identity of the person who had killed his brother and who had attempted to kill him. The identification was supported by a host of circumstances which inexorably point to the defendant as a participant in the murder and attempted murder.

It is of no moment whether the defendant himself killed the deceased or the killing was done by someone obviously his accomplice, although the evidence strongly points to the defendant as the actual killer. Nor do we find any infirmity in the evidence supporting defendant's conviction of felony murder. Although the killing may have been motivated by other, unknown considerations, the manner in which it was carried out strongly supports the jury's implicit conclusion that the taking of the money was no mere afterthought.

Turning to the principal issue presented on this appeal, defendant's challenge to the admissibility of the deceased's statement that he was going to see the defendant invites our consideration of an issue that has divided both scholarly and judicial opinion since the central principles of the pertinent hearsay exception were set forth by the Supreme Court in *Mutual Life Insurance Co. v. Hillmon, supra.* The principle is of course now universally accepted that under appropriate circumstances a declarant's statement of intent to perform an act may be admissible as evidence that he performed the act where the act is relevant to an issue in the case. See Maguire, "The Hillmon Case—Thirty Three Years After," 38 Harv. L. Rev. 709; but see Seligman, "An Exception to the Hearsay Rule," 26 Harv. L. Rev. 146. Controversy has developed over the admissibility of such a statement where the inference sought to be drawn implies some conduct on the part of one other than the declarant or to some extent requires that person's cooperation. See McCormick on Evidence [1972 ed.] §295. Most commonly the issue has been addressed in the context of criminal trials in which a deceased declarant's statement of intent to see or meet a defendant is sought to be admitted as evidence that such a meeting in fact took place.

In the *Hillmon* case itself, an action to recover on a life insurance policy, the Supreme Court sustained the admissibility of a declarant's statement that he was going to be with another person for a period of time as evidence that such an event in fact took place. A large majority of the courts which have considered essentially that issue in criminal case followed *Hillmon* in sustaining admissibility. See 6 Wigmore on Evidence, §1725 [3rd ed., 1976], footnote 1 including a detailed listing of the relevant decisions. However, relatively few decisions have undertaken a systematic analysis of the problem, and these few disclose

a division of judicial opinion. *Compare United States v. Pheaster,* 544 F.2d 353 [9th Cir., 1976] and *People v. Alcalde,* 148 P.2d 627 [Calif., 1944] (both sustaining admissibility) with *Clark v. United States,* 412 A.2d 21 [D.C. Ct. of App., 1979] (denying admissibility). *See also Shepard v. United States,* 290 U.S. 96, 105; *United States v. Cohen,* 631 F.2d 1223, 125.

In *United States v. Pheaster, supra,* which sustained the admissibility of a deceased declarant's statement of intent to meet the defendant, the Court set forth with scrupulous fairness the arguments that had been advanced in opposition to the result it reached. Two such arguments were noted.

The first is based on the supposed unreliability of an inference which implies conduct on the part of one other than declarant. The Court in *Pheaster* concluded, correctly in our view, that this objection was not compelling, observing that where the inference in question requires the cooperation of another person, the contingency added is one of degree rather than of kind, and merely goes to the weight of the evidence.

The second objection was perceived in the apparent inconsistency with the state of mind exception of an inference relating to the conduct of another person, the inference conceptually implying, in addition to the declarant's state of mind, a conclusion with regard to the state of mind of the third person. Recogizing the theoretical awkwardness of this application of the state of mind exception, the Court nonetheless sustained the admissibility of the statement, relying on the analysis set forth in *Hillmon* itself and the weight of existing judicial authority.

We are persuaded that a statement by a deceased that he intends to meet another is admissible where the statement is made under circumstances that make it probable that the expressed intent was a serious one, and that it was realistically likely that such a meeting would in fact take place. *See People v. Alcalde, supra,* at 631. The conceptual difficulty noted in *Pheaster* seems to us to obscure the common sense reality of the problem presented. Everyday experience confirms that people frequently express an intent to see another under circumstances that make it extremely likely that such a meeting will occur. Indeed, it is not uncommon for such expressions of intent to be more trustworthy evidence that the meeting took place than many statements of intent with regard to the performance of acts not involving any inference with regard to another person.

This was the very analysis that led the United States Supreme Court in *Hillmon* to find admissible a statement of intent to be with another person as evidence that such an event occurred. And although *Hillmon* itself was a civil case, it is not without significance that the Supreme Court quoted extensively, and with approval, from a decision in a criminal case involving precisely the same kind of inference at issue here which sustained admissibility on the basis of the probative trustworthiness of the evidence. *Hunter v. State,* 11 Vroom (40 N.J. Law) 495, 534, 536, 538.

The facts in this case are illustrative. The deceased was a major drug dealer who, over a period of several months prior to the day of the homicide, had seen the defendant on a number of occasions. Several meetings had taken place in the precise location to which he and his brother went on the evening he was killed. The deceased told his brother, an associate in his narcotics business, that

he owed money to the defendant and that he wished to pay him. That the deceased in fact intended to see the defendant is convincingly confirmed by the circumstance that he asked his brother to accompany him. That the deceased in fact owed money to the defendant, which he intended to pay, was confirmed by the presence in the car of a bag containing bundles of money which he took with him when he went to enter the blue Ford. Experience suggests that someone who wishes to pay a large sum of money to another with whom he has been meeting on a regular basis over a period of time is not likely to encounter insuperable difficulties in the way of paying the debt. In short, the challenged statement seems to us to have been properly admissible in light of the totality of the circumstances which confirm that the expressed intent to meet the defendant was a serious one, and that it was likely that such a meeting would in fact take place.

Even if we had determined that the statement was erroneously admitted, it would seem to us that the error would have been harmless indeed under all the circumstances. Deleting from the trial evidence the statement that the deceased was going to meet the defendant, the inference from the rest of the evidence that he expected to meet the defendant, and did so, is all but inescapable. The prior meetings of the deceased and the defendant in the neighborhood of the Pathmark, his acknowledgment of a debt to the defendant, the bag with the bundles of money, the rented blue Ford waiting in the area of the store, the taking of the bag of money, entering the blue Ford as he had on prior occasions when the defendant was in the car—all of these factors taken together would have made it unmistakably clear to the jury that the deceased expected to see the defendant.

As to the other trial errors alleged by the defendant, we agree that it was an error to have permitted questions with regard to Harry Terrell's assumption of family obligations, questions apparently intended to make the witness appear more sympathetic than would otherwise have been the case. Under the circumstances, including particularly the witness' detailed testimony that he had been actively engaged in the narcotics trade for many years, the error was clearly harmless.

We also think that the trial court erred in precluding cross-examination intended to elicit that the witness had received a promise of favorable consideration from another prosecutor's office in connection with his cooperation in a separate case. Although the arrangements sought to be brought out did not directly involve the testimony of the witness in this case, it would have been wiser to have permitted the area to have been explored by defense counsel. This error, too, seems to us to have been harmless. This was not a case in which the witness confirmed a prior police suspicion as to the identity of a killer under circumstances indicating that he was seeking favorable treatment for himself in exchange for his information. It was the witness who first identified defendant as the killer, and a realistic evaluation of the record discloses no reason why he would have falsely identified the defendant as the one who killed his brother and attempted to kill him.

Accordingly, the judgment of the Supreme Court, New York County (Fitzer, J.), rendered February 11, 1981, convicting defendant after a jury trial of two counts of murder in the second degree, attempted murder in the second degree and assault in the first degree, and sentencing him to two concurrent terms of 25 years to life, and

two concurrent terms of 8⅓ to 25 years and 5 to 15 years, to be served consecutively to the life sentence, should be affirmed.

All concur.

Order filed.